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The Honorable Jarrett Keohokalole
Hawaii State Capitol, Room 203
415 S. Beretania Street
Honolulu, HI 96813

FEDERAL EXEMPTION CONSIDERATIONS

Dear Senator Keohokalole,

Thank you for your email of November 23, 2020 in response to my federal exemption bill proposal for the upcoming legislative Session. In this email you also pointed out the objection that the Department of Health (DOH) raised last Session during the public hearing by the Senate Committee on Commerce, Consumer Protection, and Health (CPH) on the 2020 Federal Exemption Bill, [SB2462](#).

Perhaps you saw my [testimony](#) on this measure, during which I tried to answer a question from Senator Ruderman about DOH's concern (starting at 4:50).

In its [written testimony](#) on SB2462, DOH pointed to 21 C.F.R. Section 1308.35 as a reason why the department cannot petition the Drug Enforcement Administration (DEA) for a special use exemption for the state authorized use of cannabis in Hawaii.

[21 C.F.R. section 1308.35](#) is an exemption itself. It exempts processed plant material that is made from parts of the cannabis plant that fall outside the federal definition of marijuana (ie. stalks, fiber, seed oil, seed cakes), and that is not intended for human use, from the federal regulation of controlled substances, even if such material contains naturally occurring amounts of Delta-9-Tetrahydrocannabinol (THC).

This exemption is meant for commercial products made from the non-controlled parts of cannabis, that are being distributed by inter-state commerce for non-human use, such as animal feed.

It makes sense that this exemption falls within part 1308 of Chapter 21 C.F.R. because this is where regulations are found that control the human use of controlled substances that have no accepted medical use or require FDA approval, such as [21 C.F.R. section 1308.11](#), which lists the controlled substances that fall under Schedule I regulation.

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However, 21 C.F.R. section 1308.35 in no way precludes a party from petitioning the DEA for an exemption for the state authorized use of a controlled substance that is only intended for intra-state use and that falls outside of FDA regulation. In fact, the process for obtaining such an exemption is found under the same chapter at 21 C.F.R. [section 1307.03](#).

Hopefully, this puts DOH's objection to rest.

This brings us to a second area of resistance that needs to be addressed, which is an unwillingness on the part of the Office of the Attorney General (AG) to offer solutions that the State can act upon to end the conflict with the federal regulation of marijuana, a conflict that the State created when it authorized the use of cannabis in 2000 for medical purposes.

After the public hearing for SB2462 on January 31, 2020, the Chair of CPH, Senator Baker, made a request to the AG for formal guidance on this measure. We believe this was a verbal request, either over the phone or in person, because Senator Baker's office has no record of this request.

The AG responded to Senator Baker's request on February 5, 2020, with [guidance](#) that was highly inaccurate and that completely ignored the State's sovereign authority to decide how controlled substances are used within the state.

I responded to this guidance with my own [comments](#), which I provided to Senator Baker on February 9, 2020.

Unfortunately, the Senator used this flawed guidance from the AG as an opportunity to make [false statements](#) about how other states had suffered adverse effects from the federal government when they had tried to obtain a federal exemption for the state authorized use of cannabis, and deferred SB2462 at decision making on February 7, 2020 without any committee discussion. To date, no other state has filed for such an exemption. [Iowa](#) is the closest.

Senator Ruderman, before his retirement from civil service, also [requested](#) guidance from the AG on solutions that the State can act upon to end the current federal conflict. The AG [responded](#) 60+ days later with an opinion that again completely ignored the State's authority to decide how controlled substances are used within the State.

After receiving the AG's response, Senator Ruderman asked for my thoughts on what he had received. I replied with a [response proposal letter](#). Senator Ruderman ultimately decided not to pursue this matter any further, and his term soon expired.

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It is interesting that the AG brought up in their guidance to Senator Ruderman the [appropriations rider](#) that has been renewed by Congress every year since 2014.

This rider prevents DOJ/DEA funding from being used for activities that would disrupt the state authorized use of cannabis for medical purposes. Clearly, the recent expression of Congress is to support state authority in this area, but it hasn't yet been able to agree on a way to formally exempt such state authorized use from the federal regulation of marijuana as an illegal Schedule I controlled substance. This is another reason why the State needs to act on this issue.

In addition, it is not difficult to understand why the AG has adopted the attitude that the issue of cannabis regulation has already been settled. People will frequently point to the ruling in [Gonzales v. Raich](#) (2005) as proof that federal supremacy always prevails when it comes to cannabis.

Luckily for our state and our patients, this issue is far from settled. In *Gonzales v. Raich*, the court focused on the relationship between the inter-state Commerce Clause and the federal Controlled Substances Act (CSA). However, the court did not address the impact of the state authorized use of cannabis under California's Compassionate Use Act (CUA) upon the CSA. Raich was told that she should bring this matter up with her own state, which she never did.

We don't need to look very far to see that the U.S. Department of Justice (DOJ) and the DEA have never challenged the constitutionality of the state authorized use of cannabis in Hawaii. This is because states have sovereign authority to decide how controlled substances are used within the state.

We see this authority expressed in Hawaii's [Medical Use of Cannabis Act](#), which exempts patients who engage in the state authorized use of cannabis for medical purposes from the criminal penalties associated with the illegal use of a state Schedule I controlled substance.

We also see this authority recognized in the international drug treaties to which the U.S. is signatory, the [Single Convention on Narcotic Drugs](#) and the [Convention on Psychotropic Substances](#), both of which contain exemptions for the authorized use of controlled substances under domestic law.

The missing link in this chain of controlled substance regulation is a federal exemption for the state authorized use of cannabis, which would harmonize the regulation of this substance at the state, federal, and international levels.

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I learned from a recent [Civil Beat article](#) that Attorney General Connors has assembled a working group to investigate the legal ramifications of authorizing the recreational use of cannabis in Hawaii. I would love to learn more about what this group is working on, but I am not allowed to communicate directly with the AG because of its attorney-client privilege with our state officials.

I can only hope that the AG's Recreational Use Working Group will not follow the examples set by other recreational use states, such as [Arizona](#) and [South Dakota](#), which have completely relinquished their authority to decide how controlled substances are used within their state by declaring such activity to be federally illegal and branding participating citizens as federal criminals.

We have a great opportunity to end the discrimination that our medical cannabis patients are being subjected to every day because of the perception that they are violating federal law. Our state has already exercised its authority to decide how cannabis is used within the State. Now we just need a bit of moral courage to find our way out of the misconception that there is nothing the State can do to fix a situation that the State created when it failed to address the resulting conflict with federal regulation.

For the sake of our patients, I sincerely hope that the information I have provided here will encourage you to continue exploring the federal exemption option.

Please feel free to contact me anytime about this issue if I can provide additional assistance.

Thank you for taking the time to consider this pressing issue.

Aloha,



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